No. _____

In The

Supreme Court of the United States

October Term, 1997

PHILOMENA DOOLEY, et al.

— *Petitioners,*

v.

KOREAN AIR LINES CO., LTD.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

Does the general maritime law of the United States recognize a survival cause of action for predeath pain and suffering? If yes, may it be brought simultaneously with a separate wrongful death cause of action governed by the Death on the High Seas Act?

LIST OF PARTIES IN THE PROCEEDING BELOW

A. PETITIONER

Petitioners are Philomena Dooley, Personal Representative of the Estate of Cecelio Chuapoco; Robert Boyar, Executor of the Estates of Michael Truppin and Jan Moline; Carl Cole, Personal Representative of the Estate of Woon Kwang Siow; and Kimberly S. Saavedra, Personal Representative of the Estate of Jan Hjalmarrrson.

B. RESPONDENT

Respondent Korean Air Lines Co., Ltd. is a member of the Hanjin Group of Korea, which comprises companies under common management direction. The 23 affiliated companies of the Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuck Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Hanjin Data Communications Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecommunications Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd.
Hanjin Heavy Industries Co., Ltd.

LIST OF PARTIES IN THE PROCEEDING BELOW – Continued

Femtco Shipping Co., Ltd.
Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation-SOGEKO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuck Foundation

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF *CERTIORARI*

Petitioner Philomena Dooley, et al., respectfully requests that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on July 11, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 117 F.3d 1477 (D.C. Cir. 1997). It is also reproduced in the Appendix to this Petition at Ala-15a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1997 and Petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was rejected on August 28, 1997. A16a-17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the Court of first instance was pursuant to 28 U.S.C. § 1331, Federal Question Jurisdiction, and 28 U.S.C. § 1332, Diversity of Citizenship Jurisdiction.

PROVISIONS OF LAW INVOLVED

This case arises under the Warsaw Convention, formally known as The Convention for Unification of Certain Rules Relating to International Transportation by Air,

49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 40105 note. Because the locus of the deaths was on the high seas, the survival cause of action is governed by general maritime law and the wrongful death cause of action is governed by the Death on the High Seas Act (DOHSA), 41 Stat. 537 (1988 ed.), 46 U.S.C. App. § 761 *et seq.* 1988.

STATEMENT OF THE CASE

A. Nature of the Case

Decedents Cecilio Chuapoco, Michael Truppin, Jan Moline, Woon Kwang Siow and Jan Hjalmarrson were passengers on board KAL Flight KE007 on September 1, 1983 and were killed when the aircraft was shot down after having overflown airspace of the former Soviet Union. Each of the passengers was killed as the aircraft ultimately crashed into the Sea of Japan approximately 12 minutes after damage was incurred from shrapnel that was fired from a military jet. The passengers were all travelling on tickets such that the resulting claims are governed by the Warsaw Convention. The respective Personal Representatives of each decedents' estates brought separate survival causes of action on behalf of the estate and, in their fiduciary capacities, on behalf of the beneficiaries in wrongful death causes of action.

B. DISPOSITION BELOW

1. The Rulings of the District Court

All cases arising out of the KE007 disaster were consolidated in the District Court before Honorable Aubrey E. Robinson, Jr. for a single trial on liability. In 1989, a jury found that Korean Air Lines had committed "willful misconduct" so that the Warsaw limitation on damages were inapplicable, which finding was upheld by the District of Columbia Circuit on appeal. *See generally, In Re Korean Air Lines Disaster of September 1, 1983,* 932 F.2d 1475, 289 U.S. App. D.C. 391 (D.C. Cir.), *cert. denied sub nom. Dooley v. Korean Air Lines,* 502 U.S. 994 (1991). After liability was resolved, the District Court remanded all of the actions that had not originally been filed in the District Court for the District of Columbia to the originating Courts and proceeded with motions practice on damages issues for the approximately 24 claims that remained in the District Court for the District of Columbia.

In pretrial motions, KAL requested the court to rule that DOHSA alone governed the claims and to dismiss all nonpecuniary damages. The District Court denied the motion on the grounds that the Warsaw Convention and DOHSA both were implicated in the cases and that Article 17 of the Warsaw Convention permitted recovery for "damage sustained." *In Re Korean Air Lines Disaster of September 1, 1983,* Nos. 83-3587, ___ F.Supp. ___ (D.C. April 8, 1993) (*In Re KAL-D.C. I*).

The District Court then proceeded to try damages cases for several decedents and those cases proceeded on appeal to the United States Court of Appeals for the District of Columbia Circuit. There were, however, the

claims for the Chuapoco, Hjalmarsson, Truppin, Moline and Siow decedents still pending in the District Court when this Court accepted *certiorari* in *Zicherman v. Korean Air Lines*, 116 S.Ct. 629 (1996). When this Court accepted *certiorari* in *Zicherman*, the District Court stayed further proceedings in those cases pending resolution of the *Zicherman* issues. After the *Zicherman* decision was published, Korean Air Lines moved the District Court for summary judgment to dismiss the survival action claims for the decedents' predeath pain and suffering. The District Court granted the motion and the plaintiffs appealed. The Court of Appeals for the District of Columbia Circuit affirmed. *Dooley v. Korean Air Lines*, 117 F.3d 1477 (D.C. Cir. 1997). This Petition requests review of that decision.

2. The *Zicherman* Decision

In an action arising from the KAL KE007 disaster which was remanded by the District Court for the District of Columbia to the United States District Court for the Southern District of New York[1] which was tried there and which then proceeded through the Second Circuit appellate process,[2] this Court agreed in 1994 to hear a Petition for Writ of *Certiorari* on the issue whether loss of society damages were available in a Warsaw Convention case in which the death occurred on the high seas. *Zicherman v.*

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[1] The District Court Order addressing damage issues is reported at *In Re Korean Air Lines Disaster of September 1, 1983*, 807 F.Supp. 1073 (S.D.N.Y. 1992).

[2] *See, Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18 (2nd Cir. 1994), *rev'd* 116 S.Ct. 629 (1996).

Korean Air Lines, 116 S.Ct. 629 (1996). *Zicherman* held that Article 17 of the Warsaw Convention was merely a pass-through and that whatever damages law would ordinarily be applied should be applied in Warsaw-governed cases. *Id.* at 636. For deaths that occur on the high seas, according to *Zicherman*, DOHSA is the source of wrongful death remedies. *Zicherman* did not address the separate and independent survival cause of action created under general maritime law for predeath pain and suffering.

Zicherman substantively changed the state of the law as it related to the source of remedies for actions arising under the Warsaw Convention. Prior to *Zicherman*, *all* decisions addressing the issue had found the source of the remedies to be the treaty itself with the particulars to be defined by reference to federal common law.[3] After *Zicherman*, the courts must find an independent tort source on which to base recovery.

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[3] *See, e.g. Bowden v. Korean Air Lines*, 814 F.Supp. 592, 598 (E.D. Mich. 1993), *rev'd sub nom. Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir. 1996), *amended on reh'g* 96 F.3d 151 (1996) WL 490375, 1996 U.S. App. LEXIS 9857 (6th Cir. Aug. 29, 1996); *Saavedra v. Korean Air Lines*, No. 84-9324 *et seq.* (C.D. Cal. Jul. 16, 1993), *rev'd in relevant part*, 93 F.3d 547 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 584 (1997); *In Re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on April 2, 1986*, 778 F.Supp. 625, 637 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2nd Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993); *In Re Aircrash Disaster Near Honolulu, Hawaii on February 24, 1989*, 783 F.Supp. 1261, 1264 (N.D. Cal. 1992).

3. Post-*Zicherman* Circuit Court Decisions

When this Court accepted *certiorari* in *Zicherman*, there were KAL damages cases pending in the Sixth Circuit (*Bickel v. Korean Air Lines*[4]), the Ninth Circuit (*Saavedra v. Korean Air Lines*[5]) and the District of Columbia Circuit (*Forman v. Korean Air Lines*[6]; *Oldham v. Korean Air Lines*[7]). As well as the within actions pending in the D.C. District Court, one action (*Ephraimson-Abt v. Korean Air Lines Co., Ltd.*) is pending in the Southern District of New York, and one action (*Saavedra v. Korean Air Lines*) is pending in the Central District of California.

In *Bickel*, the Sixth Circuit originally held that there was no right to recover for predeath pain and suffering. In an amended decision on August 29, 1996, however, the Sixth Circuit reversed itself and held that Korean Air Lines had not properly preserved the issue on appeal by failing to raise it in initial briefs. *Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir. 1996), *amended on reh'g*, 96 F.3d 151 (1996) WL 490375, 1996 U.S. App. LEXIS 9857 (6th Cir. Aug. 29,1996).

The District of Columbia Circuit Court decided *Forman, supra*, and *Oldham, supra*, and held that Korean Air

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[4] Subsequently reported at 83 F.3d 127 (6th Cir. 1996), *amended on reh'g*, 96 F.3d 151 (1996) WL 490375, 1996 U.S. App. LEXIS 9857 (6th Cir. Aug. 29, 1996).

[5] Subsequently reported at 93 F.3d 547 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 584 (1997).

[6] Subsequently reported at 84 F.3d 446 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 584 (1997).

[7] Subsequently decided on September 23, 1997, ___ F.3d ___ (D.C. Cir. 1997), 1997 U.S. App. LEXIS 26102.

lines had not preserved its right to challenge the survival action award as it had not raised the issue in the initial briefs.

The Ninth Circuit permitted KAL to overcome its procedural deficiencies by substantively addressing the issue. The Ninth Circuit erroneously misapplied *Zicherman* by not distinguishing between survival action remedies and wrongful death remedies, and disallowed the predeath pain and suffering verdict. *Saavedra v. Korean Air Lines*, 93 F.3d 547 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 582 (1997).

4. The Decision in the Court Below

Claims on behalf of five decedents remained in the court below after *Zicherman*. Korean Air Lines moved in the District Court to dismiss all claims for nonpecuniary damages. On June 4, 1996, the court entered its decision. Under the direction of *Zicherman*, the District Court proceeded with a choice of law analysis and concluded that United States law should be applied and that DOHSA was the applicable wrongful death substantive law.

The D.C. Circuit disallowed general maritime law survival action damages for pain and suffering on the grounds that *Zicherman* held that DOHSA provided the exclusive remedy for damages and that its remedies cannot be supplemented with general maritime principles. The Court improperly failed to distinguish between wrongful death remedies and survival action remedies.

Philomena Dooley, Kimberly S. Saavedra, Robert Boyar, Carl Cole as Personal Representatives of the

Estates of Cecilio Chuapoco, Jan Hjalmarrson, Michael Truppin, Jan Moline and Woon Kwang Siow, respectively, now petition this Court for writ of *certiorari*.

REASONS FOR GRANTING THE PETITION

There are three compelling grounds for this court to grant *certiorari* and review the decision below.

1. A clear conflict now exists among circuit courts as to whether a general maritime law survival cause of action for a decedent's predeath pain and suffering exists and, if so, if it may co-exist with a wrongful death cause of action under the Death on the High Seas Act. As this Court noted in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), several Courts of Appeals have identified that there is a general maritime right of survival. *Id.* at 34, *citing Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc.*, 466 F.2d 909 (CA8, 1972); *Barbe v. Drummond*, 507 F.2d 794, 799-800 (CA1, 1974); *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (CA5, 1975); *Evich v. Connelly*, 759 F.2d 1432 (CA9, 1985). And in *Yamaha Motor Corp. v. Calhoun*, 116 S.Ct. 619, 625 n.7 (1996), this Court assumed without deciding that a general maritime law survival cause of action is created by *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), citing *Miles, supra*. Given that this Court has never directly addressed the issue, the Courts of Appeals for the First, Fifth and Eighth Circuits have taken guidance from the Court's inferences in *Miles* and *Moragne* and identified a general maritime survival action. The District of Columbia Circuit's decision, unlike those of all other Circuits except the Ninth, ignores the distinction between

the survival cause of action and the wrongful death cause of action, which this Court has itself specifically identified. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76, n.2 (1974).

2. The decision below misapplied this Court's opinions in *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) and *Zicherman*, each of which addressed only **wrongful death remedies,** by focusing solely on DOHSA's limitations on nonpecuniary damages to the improper exclusion of the separate survival cause of action. The misinterpretation will cause significant confusion among the lower courts unless clarified by this court.

3. There are still several cases pending in the District and Circuit Courts arising from the KAL disaster that would benefit from this Court's answer to the issues raised. Moreover, the Death on the High Seas Act may arguably be applied to claims arising from the TWA Flight 800 disaster which occurred off the coast of new York on July 17, 1996 in which 230 persons perished. That flight was also governed by the Warsaw Convention. Potentially 230 wrongful death and survival claims may be brought in United States courts. The issues raised are not isolated or scarce cases. This Court should provide definitive guidance on the elements of damage to prevent conflicting and inconsistent results.

ARGUMENT

This Court has never directly addressed the issue whether a general maritime law survival action exists for predeath pain and suffering, but has strongly implied at least three times that there is. *See, Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76 n.2 (1974) ("Wrongful death statutes are to be distinguished from survival statutes."); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990) (noting that several courts of appeal have identified a general maritime survival cause of action for predeath pain and suffering as such claims have been "widely accepted."); *Yamaha Motor Corp v. Calhoun*, 116 S.Ct. 619, 625 n.7 (assuming without deciding that a general maritime survival action is created by *Moragne v. States Marine Lines*, 398 U.S. 375 (1970).)

In light of this Court's broad inferences that a general maritime law survival action exists, the First, Second, Fifth and Eighth Circuits have identified common law survival causes of action for predeath pain and suffering. Only the District of Columbia Circuit and Ninth Circuit have departed from that posture. Prior to this case, the District of Columbia Circuit had not previously addressed the issue, but should have repudiated the Ninth Circuit analysis and adopted that of the First, Second,[8] Fifth and Eighth Circuits and established that there exists a general maritime law survival cause of action for predeath pain and suffering.

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[8] The Second Circuit *Zicherman* decision held that federal maritime law supplied the measure of damages but did not specifically apply it to the pain and suffering claim as KAL has not challenged the legal basis to assert the claim on appeal.

I.

THE SURVIVAL CAUSE OF ACTION IS NOT AFFECTED BY DOHSA

A. THE SURVIVAL CAUSE OF ACTION IS A REMEDY SEPARATE AND DISTINCT FROM WRONGFUL DEATH REMEDIES.

Courts have consistently recognized that survival causes of action for pre-death pain and suffering are separate and distinct from claims for wrongful death. Each kind of remedy is designed to compensate for different kinds of loss. *Moragne, supra*, 398 U.S. at 381 (a single tortious act might result in two distinct harms giving rise to two separate causes of action, *e.g.*, a survival cause of action and wrongful death cause of action.); *Sea-Land Services, Inc., supra*, 414 U.S. at 578; *Azzopardi v. Ocean Drilling and Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984), citing *Sea-Land Services, Inc., supra at* 573, 575 n. 2; *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F.Supp. 1277, 1284-85 (W.D. Pa. 1983); *Chute v. United States*, 466 F.Supp. 61, 62 (D. Mass. 1978); *Ospina v. Trans World Airlines*, 778 F.Supp. 625, 629 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992).

On the one hand, the wrongful death cause of action is designed to compensate the beneficiaries of the decedent for the losses that they themselves have sustained as a result of the decedent's death. Typically the elements of damages in a wrongful death claim include loss of support; loss of financial contributions; loss of parental advice, guidance, and training; loss of inheritance; loss of services; and, in many instances, nonpecuniary damages for loss of society. *Azzopardi, supra*, 742 F.2d at 893; *Kuntz,*

supra, 573 F.Supp. at 1284; *Chute, supra*, 466 F.Supp. 62. Depending on the statute involved, the plaintiff(s) may be the individual beneficiaries themselves or the personal representative of the estate, who holds the cause of action in a fiduciary capacity to distribute to the beneficiaries in accordance with provisions of the death statute or intestacy laws, as the case may be. The personal representative, as an entity, has no claim. *See, generally,* Speiser, Krause & Madole, *Recovery for Wrongful Death and Injury 3d* § 3:1, § 3:2 (3d edition, 1992).

On the other hand, the survival cause of action is designed to compensate the personal representative of the decedent's estate (as the replacement holder of the claim after the injured person dies) for damages that the decedent himself could have recovered but for his death. *Azzopardi, supra,* at 893; *Chute,* 466 F.Supp. at 52; *Kuntz, supra,* at 1284.

This Court, in *Yamaha Motor Corp. v. Calhoun*, 116 S.Ct. 619, 113 L.Ed.2d 578, 64 USLW 4048 (1996), *aff'd*, 40 F.3d 622 (3d Cir. 1994), recently affirmed the decision by the Court of Appeals for the Third Circuit, which decision included the following succinct explanation of the distinction between the wrongful death cause of action and the decedent's action for pain and suffering preceding death:

> . . . Throughout the previous discussion of the case law, reference has been made to wrongful death actions and to survival actions. Although they are often lumped together without any distinction . . . they are, in fact, quite distinct . . .
>
> A wrongful death cause of action belongs to the decedent's dependents (or closest kin in the case

> of the death of a minor). It allows the beneficiaries to recover for the harm that *they* personally suffered as a result of the death, and it is totally independent of any cause of action the decedent may have had for his or her own personal injuries. Damages are determined by what the beneficiaries would have "received" from the decedent . . . A survival action, in contrast, belongs to the estate of the deceased (although it is usually brought by the deceased's relatives acting in a representative capacity) and allows recovery for the injury to the *deceased* from the action causing death. Under a survival action, the decedent's representative recovers for the decedent's pain and suffering, medical expenses, lost earnings . . . and funeral expenses . . . *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 737-38 (3d Cir. 1994) (citations omitted; emphasis by the Court).

Since the two kinds of actions (death and survival) encompass separate and distinct measures of damages and beneficiaries, "American courts have painstakingly distinguished the two causes of action for many years." *Kuntz, supra,* 573 F.Supp. at 1285. Thus, the legislative allowances and limitations contained in wrongful death statutes (including DOHSA) simply do not address a survival cause of action.

See, also, *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989), *rev'd on other grounds*, 498 U.S. 19 (1990); *Walstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1093 (2d Cir. 1993).

B. GENERAL MARITIME LAW PROVIDES FOR A SURVIVAL ACTION FOR PRE-DEATH PAIN AND SUFFERING.

At common law, it was generally believed that there was no right to recover in a survival action for a decedent's pre-death pain and suffering once he/she were killed, any more than it was believed that there was a right to recover at common law for a wrongful death. In *Moragne*, however, this Court indicated skepticism that there was any legitimate historical basis for the denial of a common law recovery for death and repudiated prior decisions that invoked that unsubstantiated belief. 398 U.S. at 378-89.

Moragne established that general maritime law provided a cause of action for wrongful death in territorial waters. In *Moragne*, this Court specifically noted that the law of the United States could change by common acceptance among the states of a policy permitting recovery for wrongful death, which policy itself becomes a part of American jurisprudence. *Id.* at 390. Similarly, in the spirit of *Moragne*, a survival cause of action must be acknowledged under general maritime common law since the majority of states permit some kind of survival actions and all of those states which do permit survival action permit recovery for conscious pre-death pain and suffering. *Ospina, supra*, 778 F.Supp. at 630. *Barbe v. Drummond*, 507 F.2d 795, 799-800 (1st Cir. 1974).

In *Sea-Land, supra*, 414 U.S. at 577-78, this Court specifically noted that *Moragne* had established the distinction between a cause of action for the person injured to be made whole and a cause of action in the case of

death for the loss of his dependents, *id.* citing *Moragne*, 398 U.S. at 382. In *Sea-Land*, the decedent had been severely injured and had recovered an amount for his disability and pain and suffering before he died. He died shortly after that action was terminated and his widow brought a wrongful death action. Sea-Land moved to dismiss the death action, arguing there was no loss independent of the decedents' claim for his personal injuries. This Court quickly rejected that argument, holding that there was one claim personal to the injured person and a separate, independent cause of action in the event of death for the decedents' dependents. *Id.*

Following *Moragne*, many federal circuit and district courts relied on its rationale to hold that the general maritime law encompassed a general maritime survival action, one that permitted recovery for conscious pain and suffering. *See, e.g., Miles v. Melrose; Zicherman, supra*, 43 F.3d at 23; *Greene v. Vantage Steamship Corp.*, 466 F.2d 159, 166 (4th Cir. 1972). *Barbe, supra*, 507 F.2d at 799; *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (5th Cir. 1975); *Spiller v. Thomas M. Lowe, Jr. Associates*, 466 F.2d 903, 909 (8th Cir. 1972); *Self v. Great Lakes Dredge and Dock Co.*, 832 F.2d 1540, 1549 (11th Cir. 1987); *Anderson v. Whitaker Corp.*, 894 F.2d 804 (6th Cir. 1990); *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 623 (5th Cir. 1981); *Kuntz, supra*, 573 F.Supp. at 1284; *Chute v. United States, supra*, 466 F.Supp. at 69; *McAleer v. Smith*, 791 F.Supp. 923, 926 (D.R.I. 1992); *Rye v. United States Steel Mining Co.*, 856 F.Supp. 274, 279 (E.D. Va. 1994); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F.Supp. 1151, 1156 (S.D. Fla. 1992); *Gray v. Lockheed Aeronautical Systems Co.*, 880 F.Supp.

1559, 1569 (N.D. Ga. 1995); *Newhouse v. United States*, 884 F.Supp. 1389, 1393 (D.Nev. 1994).

The general maritime survival cause of action is separate and distinct from, and ungoverned by, any wrongful death remedy, whether the death remedy is DOHSA, the Jones Act (46 U.S.C. App. § 688 *et seq.*), or a *Moragne* cause of action.

C. DOHSA ADDRESSES ONLY WRONGFUL DEATH CLAIMS AND NOT SURVIVAL ACTION CLAIMS.

DOHSA is a wrongful death statute and contains no survival provision which leaves a legislative void which, in turn, allows the general maritime law survival action based on *Moragne* to supplement the wrongful death remedies under DOHSA. This precept has been accepted by the First Circuit (*Barbe, supra*), the Fifth Circuit (*Azzopardi, supra; Law, supra*), the Second Circuit (*Zicherman, supra*), and, in the context of a *Moragne* death action, by the Eighth Circuit (*Spiller, supra*). Only the District of Columbia Circuit and the Ninth Circuit have rejected the precept.

The District of Columbia Circuit Court's reliance on this Court's decision in *Mobil Oil Corp. v. Higginbotham*, 98 S.Ct. 2010 (1978) to suggest that DOHSA precludes the use of a general maritime law survival action to supplement the recovery allowed under DOHSA is misplaced. A18a-19a. *Higginbotham* involved *only* the question of whether nonpecuniary damages for loss of society could be recovered in the *death action* under DOHSA by use of general maritime law. This Court, speaking only to remedies available in the death action, held that damages

recoverable under DOHSA could not be supplemented by general maritime law to provide a recovery for loss of society. *Higginbotham* addressed only the wrongful death remedies, not the separate survival remedies. Virtually every case decided *after Higginbotham* has limited its holding to the wrongful death action, establishing that the limitations of DOHSA for the death action have no preclusive effect on a survival action even though the injuries occur from the same circumstances that ultimately caused the death on the high seas. *Barbe, supra*, 507 F.2d at 800. ("[Acknowledging a general maritime survival action] also avoids a conflict with DOHSA, since survival and wrongful death actions have long been recognized as distinct causes of action." (citations omitted)); *Azzopardi, supra*, 742 F.2d at 893; *Kuntz, supra*, 573 F.Supp. at 1285; *Chute, supra*, 466 F.Supp. at 69; *McAleer, supra*, 791 F.Supp. at 926-27; *Gray, supra*, 880 F.Supp. at 1569; *Law; In Re Air Crash Disaster Near Honolulu, Hawaii*, 783 F.Supp. 1261, 1264 (N.D. Cal. 1992); *Rye v. United States Steel Mining Corp.*, 856 F.Supp. 274, 279 (E.D. Va. 1994).

Since DOHSA does not address a survival action for pre-death pain and suffering, it leaves, in effect, a gap in the coverage provided by DOHSA. As Justice Stephens pointed out in *Higginbotham, supra*, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." 98 S.Ct. at 2015. Because DOHSA is a wrongful death statute and not a survival statute, the federal courts are free to fill what otherwise would be a legislative void by creating a federal survival action for pain and suffering which would apply to persons who were subsequently killed on the high seas by the same

events. *See, e.g., Barbe, surpa,* at 799-800; *Chute, supra,* 466 F.Supp. at 69; *Azzopardi, supra,* 742 F.2d at 893.

Subsequent to *Higginbotham,* this Court addressed some of the issues relating to the general maritime survival cause of action in *Miles, supra,* an action brought under the Jones Act and general maritime law. The mother of a deceased seaman claimed a recovery under a general maritime law survival action for the seaman's pre-death pain and suffering and for loss of his future wages. The Fifth Circuit found that the survival cause of action encompassed a right to recover for both the decedent's pre-death and suffering and for his lost future wages. *Id.* 882 F.2d at 986. The Fifth Circuit confirmed the survival cause of action for pain and suffering by following the rationale of *Moragne* that, since almost all the states and the Jones Act provided for a pre-death pain and suffering claim under the survival action, such remedies had become a part of common law through the general maritime law.

On *certiorari,* this Court noted without criticism that many Courts of Appeals had identified a general maritime action surviving the death of a seaman because survival actions had gained widespread acceptance. 498 U.S. at 34. This Court refused, however, to generally address the breadth of the recovery under the survival action, and limited its decision to the issue of whether there was a right to recover for loss of future earnings. It denied the loss of earnings recovery by noting that only a few states permitted a recovery in a survival action for lost future earnings. 498 U.S. at 35. This notation was by way of comparison with the kind of "wholesale" and "unanimous" policy judgment that was in effect in the

states of the United States that had prompted this Court to create the new cause of action in *Moragne. Id.* at 34. This Court reasoned that, since the considered judgment of a large majority of American legislatures was to preclude recovery for loss of future income in a survival action, that recovery as a measure of damages had not become the general law of the United States. In contrast, where the clear majority of states and the Jones Act permit a survival claim for pre-death pain and suffering, it is reasonable that such a remedy *has* become the general law of the United States. *See, Azzopardi, supra,* 742 F.2d at 893.

It is also significant that this Court commented without criticism on the several lower Courts of Appeals' reliance on the plethora of state survival statutes as dictating a change in the general maritime rule against survival (*id.* at 34) and left undisturbed the survival action of pre-death pain and suffering. If this Court felt that the pain and suffering was a legally insufficient claim, or that general maritime law did not include that remedy, it could easily have addressed those issues in the context of the decision it *did* reach as the issue was encompassed in its grant of *certiorari.*

The underlying assumption, i.e., that there is and was no common law right to recover for survival or death, has been repudiated by *Moragne.* Moreover, this Court has assumed that *Moragne* encompasses a survival action for predeath pain and suffering. *Yamaha Motor Corp., supra,* at 116 U.S. at 625 n.7, thus acknowledging the distinction between the two kinds of actions again.

The court below ignored this Court's comments in *Gaudet, Miles* and *Yamaha Motor Corp.*, which discussed survival action remedies, by focusing solely on *Zicherman* and *Higginbotham*, which discussed only wrongful death remedies. The court below erred in doing so.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN THE CIRCUITS WHETHER A GENERAL MARITIME LAW SURVIVAL ACTION EXISTS AND WHETHER IT MAY BE JOINED WITH A WRONGFUL DEATH ACTION UNDER DOHSA

Certiorari should be granted to determine that a general maritime survival cause of action exists under an analysis akin to that in *Moragne*, which identified a general maritime law wrongful death cause of action. The traditional maritime rule disallowing a survival right has been changed by the widespread acceptance of a survival cause of action for predeath pain and suffering. *See, Yamaha Motor Corp., supra* 116 S.Ct. at 625 n.7 (1996) (" . . . we assume without deciding that *Moragne* also provides a survival action.")

Once the Court identifies that a survival right exists, it should resolve the conflict in the Circuits and hold affirmatively that the survival action may co-exist with a DOHSA death action and that DOHSA limitations on nonpecuniary damages do not abrogate survival action remedies.

As has been shown, the District of Columbia Circuit's denial of a general maritime law survival cause of action where the wrongful death cause of action arises under

DOHSA contravenes decisions exactly to the contrary in the First Circuit, *Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974), and the Fifth Circuit, *Azzopardi v. Ocean Drilling and Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984), *Law v. Sea Drilling Corp.*, 523 F.2d 793, 794-95 (5th Cir. 1975) each of which dealt with a survival action in the context of the death action arising under DOHSA.[9] The District of Columbia Circuit's decision also contravenes the logic and legal analysis of the Eighth Circuit, which permitted a general maritime survival action to be joined with a *Moragne* general maritime death action. *See, Spiller v. Thomas M. Lowe, Jr. Assoc., Inc.*, 466 F.2d 903, 909 (8th Cir. 1972).

III.

CERTIORARI SHOULD BE GRANTED TO CORRECT THE DISTRICT OF COLUMBIA CIRCUIT'S MISAPPLICATIONS OF THIS COURT'S DECISION IN *MOBILE OIL CORP., MILES,* AND *ZICHERMAN*

The rationale that the District of Columbia Circuit used to substantiate its decision shows a fundamental misperception of this Court's decisions in *Mobile Oil Corp.*

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[9] Several District courts have also found a general maritime law survival cause of action which may be brought simultaneously with a DOHSA death action; *Gray v. Lockheed Aeronautical Systems*, 880 F.Supp. 1559, 1569 (N.D. Ga. 1995); *Rye v. United States Steel Mining Co.*, 856 F.Supp. 274, 279 (E.D. Va. 1994); *Chute v. United States*, 466 F.Supp. 61, 69 (D. Mass. 1978); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F.Supp. 1277, 1285 (W.D. Pa. 1983); *Favoloro v. S/S Golden Gate*, 687 F.Supp. 475, 479 (N.D. Cal. 1987); *McAleer v. Smith*, 791 F.Supp. 923 (D.R.I. 1992).

and *Zicherman*. Each of those decisions related to whether a particular type of *wrongful death* element of damage was available in a DOHSA wrongful death action, e.g., loss of society. Here, the type of damage at issue, i.e., the recovery for the decedent's pain and suffering, is peculiarly a survival action remedy, not a wrongful death remedy.

The District of Columbia Circuit also misapprehends this Court's decision in *Miles, supra*. The court correctly read *Miles* as disallowing recovery of non-pecuniary wrongful death damages under the general maritime law, but failed to address its application to a separate survival claim. The *Miles* Court indicated that several Circuits had identified a general maritime survival action and cited Circuit decisions that had found the right included claims for predeath pain and suffering, which *had* been widely adopted and accepted. 498 U.S. at 34. Indeed, the *Miles* Court had been asked to do what petitioners now request and to specifically acknowledge a general maritime survival action. *Miles* declined to do so only because it was unnecessary to the narrow issue presented here. *Id. Certiorari* should be granted to answer this important question that has been pending unanswered since *Miles*.

Lastly, the District of Columbia Circuit misapprehends the Court's recent decision in *Zicherman*. The *Zicherman* court addressed typical wrongful death damages. In this case, petitioner is not seeking to "supplement" statutory wrongful death damages. Rather, petitioner is seeking acknowledgment of the propriety of asserting a distinct survival cause of action remedy with

whatever damages are permissible under the death cause of action.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *certiorari* should be granted in all respects.

Dated: October 21, 1997

Respectfully submitted,

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 6, 1997 Decided July 11, 1997

No. 96-5278

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983

PHILOMENA DOOLEY, ET AL. V. KOREAN AIR LINES CO., LTD.

Appeal from the United States District Court
for the District of Columbia
(83ms00345)

Juanita M. Madole argued the cause and filed the briefs for appellants.

Andrew J. Harakas argued the cause for appellee. With him on the brief was *George N. Tompkins, Jr.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD and RANDOLPH, *Circuit Judges*, and BUCKLEY, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: On September 1, 1983, while Korean Air Lines flight KE007 was en route from New York City to Seoul, South Korea, via Anchorage, Alaska, a Soviet military aircraft shot down the airliner over the Sea of Japan, killing all 269 people on board. We have recounted details of the tragedy elsewhere. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1476-79 (D.C. Cir. 1991).

In the ensuing litigation, a joint liability trial on the claims of 137 plaintiffs took place in the United States District Court for the District of Columbia. A jury found that Korean Air Lines had committed "willful misconduct," thus removing the Warsaw Convention's limitations on liability. This court affirmed. *Korean Air Lines Disaster*, 932 F.2d at 1479-84. (We did, however, vacate an award of punitive damages. *Id.* at 1484-90.) The actions were then remanded to the courts in which they had originated for individual proceedings on compensatory damages. This case comes to us as an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), in five damages actions that have not yet gone to trial.

Early in the damages phase of the litigation, the district court rejected Korean Air Lines's argument that the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*, restricted the damages plaintiffs could recover. As discussed later, the Act permits only certain surviving relatives to recover "pecuniary" losses. The district court

believed another law – Article 17 of the Warsaw Convention (*see* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 17, 49 Stat. 3000, 3018) – "allows for the recovery of all 'damages sustained,' " meaning any "actual harm" any party "experienced" as a result of the crash. Thereafter, the Supreme Court reached a different conclusion: the Warsaw Convention, rather than providing a measure of damages, "permit[s] compensation only for legally cognizable harm, but leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules." *Zicherman v. Korean Air Lines Co.*, 116 S. Ct. 629, 637 (1996).

After the *Zicherman* decision, Korean Air Lines moved in the district court to dismiss all claims for nonpecuniary damages, including damages for loss of society and mental grief, and damages for the decedents' predeath pain and suffering. Because *Zicherman* directed lower courts to look to some source of domestic law in a Warsaw Convention case, the district court began with a choice-of-law analysis and concluded that United States law governed these suits. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 12-14 (D.D.C. 1996). No party has challenged that determination. The court then ruled that the Death on the High Seas Act provided the applicable U.S. law, *id.* at 14, and that the Act did not permit the recovery of nonpecuniary damages, *id.* at 14-15.

Plaintiffs detect two faults in the district court's reasoning. While they concede that the Death on the High Seas Act itself provides no right to recover damages for a decedent's pre-death pain and suffering, they believe the

"general maritime law" recognizes such a cause of action. They also interpret a provision of the Death on the High Seas Act as allowing them to proceed under South Korean law despite the district court's undisputed choice-of-law finding that U.S. law applies. The law of South Korea, they say, permits them to recover damages for pre-death pain and suffering and for the mental grief of surviving relatives.

I

The first section of the Death on the High Seas Act allows the personal representative of any person who dies as the result of a "wrongful act, neglect, or default occurring on the high seas," to sue "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C. App. § 761.[1] The next section limits recovery to "a fair and just compensation for the pecuniary loss sustained by the persons for whose

[1] Section 761 states in full:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

benefit the suit is brought." *Id.* § 762.[2] Other sections establish a limitations period, *id.* § 763a, govern actions under foreign law, *id.* § 764, permit a personal injury suit to continue under the Act if the plaintiff dies while the action is pending, *id.* § 765, bar contributory negligence as a complete defense, *id.* § 766, exempt the Great Lakes and state territorial waters from the Act's coverage, *id.* § 767, and preserve certain state law remedies and state court jurisdiction, *id.*; *see also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-33 (1986).

That the Death on the High Seas Act does not permit recovery for a decedent's pre-death pain and suffering is clear enough. The Act provides a remedy only for injuries suffered by a limited class of surviving relatives, not the decedent. It is, after all, a "wrongful death" statute, giving survivors a right of action for losses they suffered as a result of the decedent's death, not a "survival" statute, allowing a decedent's estate to recover for injuries suffered by the decedent. *See Nelson v. American Nat'l Red Cross*, 26 F.3d 193, 199 (D.C. Cir. 1994); *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 637 (3d Cir. 1994), *aff'd*, 116 S. Ct. 619 (1996); *McInnis v. Provident Life & Accident*

[2] Section 762 provides:

> The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Ins. Co., 21 F.3d 586, 589 (4th Cir. 1994). Pain and suffering is, in any event, nonpecuniary.[3] On the other hand, § 762 of the Act permits only the recovery of "compensation for . . . pecuniary loss sustained."

Plaintiffs do not quarrel with any of this. But, they say, the Death on the High Seas Act is not the only pertinent source of U.S. law. As they see it, "general maritime law" – a species of federal common law – also applies and it allows a survival action for pre-death pain and suffering independent of any action under the Death on the High Seas Act.

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[3] Courts often point to pain and suffering as an example of a nonpecuniary loss. *See, e.g., Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 544 n.10 (1991); *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 939 (1st Cir. 1995); *Korean Air Lines Disaster*, 932 F.2d at 1487. It is therefore strange to find several cases under the Jones Act, 46 U.S.C. App. § 688, describing damages for pre-death pain and suffering as pecuniary. *See, e.g., Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1090 n.7 (4th Cir. 1985); *Neal v. Barisich, Inc.*, 707 F. Supp. 862, 867 (E.D.La.), *aff'd*, 889 F.2d 273 (5th Cir. 1989). The Jones Act applies the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), to seamen. While FELA and the Jones Act permit only pecuniary wrongful death damages, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 68-71 (1913), FELA contains a survival provision (45 U.S.C. § 59) allowing recovery of damages for pre-death pain and suffering, *see St. Louis, Iron Mountain & Southern Ry. v. Craft*, 237 U.S. 648, 658 (1915). Rather than mislabeling pain and suffering as a pecuniary loss in Jones Act cases, it would be more accurate to recognize that under FELA and the Jones Act only wrongful death damages, not survival damages, need be pecuniary. *See Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746, 748-49 (9th Cir. 1980).

The Supreme Court identified a wrongful death cause of action under the general maritime law in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The death in *Moragne* occurred in waters within the state of Florida, *id.* at 376, so the Death on the High Seas Act did not apply. The Court held that general maritime law nevertheless provided the decedent's widow with a remedy for wrongful death caused by a violation of federal maritime duties. *Id.* at 409. In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585-90 (1974), in which the death occurred in Louisiana waters, the Court held that recovery in a *Moragne* wrongful death action is not limited to pecuniary damages, as it is in actions under the Death on the High Seas Act. (Although the Court permitted nonpecuniary damages for loss of society in *Gaudet*, it said that "mental anguish or grief . . . is not compensable under the maritime wrongful-death remedy," 414 U.S. at 585 n.17.) A few years after *Gaudet*, the Court held that if a death occurs on the high seas, the Death on the High Seas Act, not general maritime law, governs and therefore nonpecuniary wrongful death damages may not be recovered. *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618, 622-26 (1978).

The Supreme Court has declined to say whether the reasoning of *Moragne* may be extended to permit a survival cause of action under the general maritime law. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S. Ct. 619, 625 n.7 (1996); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990). We have never addressed the issue. Other courts of appeals have and a majority of them recognize survival actions. *See, e.g., Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4

F.3d 1084, 1093 (2d Cir. 1993); *Ward v. Union Barge Line Corp.*, 443 F.2d 565, 569 (3d Cir. 1971), *overruled in part on other grounds by Cox v. Dravo Corp.*, 517 F.2d 620 (3d Cir. 1975) (en banc); *Greene v. Vantage S.S. Corp.*, 466 F.2d 159, 166 (4th Cir. 1972); *Miles v. Melrose*, 882 F.2d 976, 986 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Spiller v. Thomas M. Lowe, Jr., & Assocs., Inc.*, 466 F.2d 903, 909 (8th Cir. 1972); *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1549 (11th Cir. 1987).

Three courts of appeals have dealt with the availability of a general maritime law survival action for deaths on the high seas. The First and Fifth Circuits have permitted general maritime law survival actions in cases in which the Death on the High Seas Act also applies. *See Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893-94 (5th Cir. 1984); *Barbe*, 507 F.2d at 799-800. The Ninth Circuit reached the opposite conclusion. *See Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 553-54 (9th Cir. 1996).[4] We believe the Ninth Circuit got it right.

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[4] Like the general maritime law, state wrongful death statutes may not be used to supplement Death on the High Seas Act remedies with nonpecuniary damages. *Tallentire*, 477 U.S. at 232. And although the Supreme Court has held that state survival and wrongful death statutes apply to at least some deaths occurring in territorial waters, *Yamaha*, 116 S. Ct. at 626-29, it has not said whether state survival statutes can apply to deaths on the high seas, *see Tallentire*, 477 U.S. at 215 n.1. A few lower courts have allowed recovery under a state survival statute to supplement recovery under the Death on the High Seas Act. *See, e.g., Solomon v. Warren*, 540 F.2d 777, 792 n.20 (5th Cir. 1976); *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1388-92 (3d Cir. 1971).

Assume general maritime law provides a survival action in some cases (we do not decide whether it does). Still, the effect of the Supreme Court's decision in *Higginbotham* must be evaluated. Nonpecuniary damages may be recovered under general maritime law, but not, the Court held, when the death is on the high seas. Then the Death on the High Seas Act controls and the judiciary may not evaluate the policy arguments in favor of, or against, allowing nonpecuniary damages. "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." *Higginbotham*, 436 U.S. at 623. "The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages." *Id.* at 625. *Moragne* developed general maritime law in a space Congress had not occupied. But "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.*

Higginbotham thus instructs the lower federal courts not to extend the general maritime law to areas in which Congress has already legislated. For deaths on the high seas, Congress decided who may sue and for what. Judge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be. Congress made the law and it is up to Congress to change it.

At almost the same time as the Sixty-Sixth Congress passed the Death on the High Seas Act, it enacted the Jones Act, 46 U.S.C. App. § 688. *See* Death on the High Seas Act, ch. 111, 41 Stat. 537 (1920); Merchant Marine (Jones) Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920). The Jones Act contains a survival provision applicable to certain maritime deaths. *See supra* note 3. A fair assumption is that the members of Congress who passed the Death on the High Seas Act understood the difference between wrongful death and survival actions. Their inclusion of a survival remedy in the Jones Act but not in the Death on the High Seas Act scarcely seems inadvertent.

Higginbotham stated that the Death on the High Seas Act expressed a congressional "judgment on such issues as . . . survival, and damages." 436 U.S. at 625. In support, the Court cross-referenced a footnote citing 46 U.S.C. App. § 765, a provision allowing a personal injury suit, initiated by a plaintiff who dies while the suit is pending, to be continued under the Act. A law professor has criticized the Court's statement as "casual," or "at best dictum and conceivably nothing more than an ill-advised gratuitous remark." Joseph F. Smith, Jr., *A Maritime Law Survival Remedy: Is There Life After Higginbotham?*, 6 MAR. LAW. 185, 196, 198 (1981). Dictum yes, ill-advised no. That the Death on the High Seas Act contains only a very limited survival provision is no reason for treating the Act as something other than an expression of legislative judgment on the extent to which survival actions are to be permitted. When Congress decides to go only so far it necessarily has decided to go no further.[5]

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[5] One of the drafters of the Death on the High Seas Act explained the Act's unusual, limited survival provision. The Act originally required suits to be filed "within two years from the date of [the] wrongful act, neglect, or default." Ch. 111, § 3, 41 Stat. 537. The survival provision of § 765 preserved for defendants the benefits of the Act's restricted limitations period without creating an undue barrier for wrongful death actions in cases in which the death did not occur soon after the event causing the injury. In such cases, a suit filed within two years while the decedent was still alive would preserve the action. *See* Robert M. Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 126 (1921).

While the contours of plaintiffs' proposed survival action for deaths on the high seas are uncertain, they presumably would allow a decedent's estate to recover compensation for the decedent's injuries. This would necessarily expand the class of beneficiaries in the Death on the High Seas Act, which does not include decedents' estates. Yet *Higginbotham* held that "it would be no more appropriate to prescribe a different measure of damages than to prescribe . . . a different class of beneficiaries." 436 U.S. at 625. It was, to the Court, unthinkable that a legislatively-mandated class of beneficiaries could be judicially altered. Suits under the Act are "for the *exclusive* benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C. App. § 761 (emphasis added). In a death on the high seas case, there is no relevant difference between a court's giving a decedent's nondependent niece a right of action under general maritime law, which is clearly impermissible, and allowing the decedent's estate to sue for the decedent's injuries under the general maritime law.

Perhaps plaintiffs envisage a survival action that would not alter the Death on the High Seas Act's beneficiary class. One might permit a decedent's personal representative to sue for damages suffered by the decedent, but only for the benefit of those named in the Act. For example, the Federal Employers' Liability Act and the Jones Act give a decedent's personal representative the right to recover survival damages for the benefit of a fixed class of surviving relatives. *See* 45 U.S.C. § 59; 46 U.S.C. App. § 688.[6] Such an approach could leave the Death on the High Seas Act's beneficiary class intact. But it would change the damages available to the Act's beneficiaries. No longer would damages be limited to "compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought," 46 U.S.C. App. § 762. The beneficiaries would also receive compensation for nonpecuniary losses sustained by others – their decedents. That result *Higginbotham* forecloses.

Because the Death on the High Seas Act is a "wrongful death" statute, plaintiffs insist it has no bearing on survival remedies. They have missed the point. That the Act provides remedies only to certain surviving relatives for their losses and provides no compensation for the decedent's own losses is the very reason why courts may

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[6] Under 45 U.S.C. § 59:

> Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee. . . .

not create a survival remedy. The Act explicitly limits beneficiaries to a particular group of surviving relatives, and it explicitly limits the recoverable damages to pecuniary losses suffered by the members of that group. These are the limits of recovery and a court may neither expand nor contract them. Calling the Act a wrongful death statute does nothing more than describe the manner in which Congress restricted the beneficiary class and the recoverable damages. It does not deprive those restrictions of their significance.

Plaintiffs also offer comparisons to the Jones Act, emphasizing that general maritime law remedies exist alongside Jones Act statutory remedies. The Jones Act provides compensation to seamen injured as a result of negligence, and in the event of death it provides both a wrongful death and a survival action. *See* 46 U.S.C. App. § 688; 45 U.S.C. §§ 51, 59. In *Miles*, the Supreme Court held that after *Moragne* a seaman's survivors could pursue a general maritime law wrongful death action alleging unseaworthiness (a strict liability theory), in addition to a Jones Act negligence claim. *Miles*, 498 U.S. at 29-30. Plaintiffs may have identified an inconsistency in how the Court treats the Jones Act and how it treats the Death on High Seas Act. But this case involves the Death on the High Seas Act, and we therefore are bound to follow *Higginbotham*. Moreover, *Miles* severely restricted the extent to which the general maritime law may expand the remedies available under the Jones Act. Relying on *Higginbotham*, the Court refused to allow the decedent's survivors to recover nonpecuniary wrongful death damages under the general maritime law because they could not recover such damages under the Jones Act. *Miles*, 498 U.S.

at 30-33. So while the general maritime law permits recovery for violations of duties other than those imposed by the Jones Act, such recovery may not exceed the recovery that would be available under the Jones Act if it applied. It is thus uncertain how much mileage plaintiffs could get out of their Jones Act analogy even if we disregarded the Court's pronouncements in *Higginbotham*.

II

Plaintiffs invoke South Korean law on the basis of this provision of the Death on the High Seas Act:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

46 U.S.C. App. § 764. As plaintiffs read § 764, it allows them to use an action under the Death on the High Seas Act to assert claims cognizable under foreign law. They have submitted the statement of a South Korean attorney that South Korean law would allow the recovery of damages for the decedents' pre-death pain and suffering and for the surviving relatives' mental anguish. The district court rejected the plaintiffs' submission as "irrelevant" in light of its determination that U.S. law applied. *Korean Air Lines Disaster*, 935 F. Supp. at 14 n.2.

The case law regarding § 764 is not uniform. Some opinions seem to support plaintiffs' view of § 764. *See Heath v. American Sail Training Ass'n*, 644 F. Supp. 1459, 1467 (D.R.I. 1986); *Noel v. Linea Aeropostal Venezolana*, 260 F. Supp. 1002, 1004-06 (S.D.N.Y. 1966); *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94, 96 (S.D.N.Y. 1957); *Iafrate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619, 622 (S.D.N.Y. 1952). Other opinions support the view that § 761 and § 764 are mutually exclusive and that plaintiffs therefore may not simultaneously advance claims under both U.S. and foreign law. *See In re Air Crash Disaster Near Bombay, India on Jan. 1, 1978*, 531 F. Supp. 1175, 1185-88 (W.D.Wash. 1982); *Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V.*, 188 F. Supp. 594, 596-97 (S.D.N.Y. 1960), *appeal dismissed*, 299 F.2d 78 (2d Cir. 1962); *The Vulcania*, 41 F. Supp. 849 (S.D.N.Y. 1941), *modifying* 32 F. Supp. 815 (S.D.N.Y. 1940); *The Vestris*, 53 F.2d 847, 855-56 (S.D.N.Y. 1931).

If plaintiffs were correct, § 764 would license them to pick and choose among provisions of U.S. and South Korean law in order to assemble the most favorable package of rights against the defendant. That would be odd enough. But stranger still is the notion that South Korean law has any bearing on this case. Faced with *Zicherman*'s directive to make a choice-of-law determination, 116 S. Ct. at 637, the district court chose U.S. law, not South Korean law. Plaintiffs have not appealed this ruling. So how does South Korean law enter the picture? True, § 764 permits suits under foreign law when "a right of action is granted by the law of any foreign State." Since U.S. law, not South Korean law (or French law or Brazilian law), applies to this case, we are at a loss to understand how "a

right of action is granted by the law of " South Korea or any other foreign country. If South Korean law does not apply to a suit, it can hardly grant rights to the parties. Once the choice-of-law determination is in favor of U.S. law, only U.S. law can grant plaintiffs any sort of right of action.

It is fair to ask what function § 764 serves if not the one plaintiffs imagine. If, as we have decided, § 764 cannot be used to inject foreign law into a case controlled by U.S. law, one might suppose it has no purpose. When foreign law governs a case, the court would not consider the various provisions of the Death on the High Seas Act. But § 764 is not without significance.

The provision originated as an amendment recommended by the Senate Committee on the Judiciary. The Committee's report took the position (no longer current) that Congress had no power to create a right of action allowing the recovery of damages against foreigners or foreign vessels for deaths occurring on the high seas. S. REP. No. 66-216, at 4 (1919). The report also recognized that American courts permitted suits concerning foreign vessels to proceed under the law of the vessel's home country. *Id.* at 4-5. For example, the claims in *La Bourgogne*, 210 U.S. 95 (1908), were against a French vessel and its owners for deaths occurring on the high seas. The Supreme Court held that while U.S. law at that time did not recognize a wrongful death cause of action, wrongful death damages were available under French law in a proceeding in a U.S. court. *Id.* at 138-40. Section 764 was the legislative response to decisions permitting the owners of such foreign vessels to take advantage of U.S. statutes limiting their liability, *see, e.g., Oceanic Steam*

Navigation Co. v. Mellor, 233 U.S. 718, 731 (1914) ("*The Titanic*").[7] The Committee report explained § 764 this way: "[A]s the Supreme Court has held that the limited liability statute of the United States applies to foreign ships seeking such limitation of liability in our courts, the committee recommends that the bill be amended by the insertion of [§ 764]." S. REP. No. 66-216, at 5.

It was immediately recognized that § 764 was "superfluous" insofar as it provided that U.S. courts would hear suits under foreign law in cases involving foreign vessels. Hughes, *supra*, 31 YALE L.J. at 118, 122; *see also* Calvert Magruder & Marshall Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395, 423-24 (1926). As the Senate Committee realized, that was already the practice. The real force of § 764 was its barring foreign vessel owners from taking advantage of American limitation of liability laws.

Another function of § 764, not discussed in the legislative history, is to require foreign law actions for wrongful deaths on the high seas to be brought in admiralty, at least if the plaintiffs wish to prevent the defendants from limiting their liability. *See The Silverpalm*, 79 F.2d 598, 600 (9th Cir. 1935); *Bergeron*, 188 F. Supp. at 597-98; *Iafrate*, 106 F. Supp. at 621-22; *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909 (S.D.N.Y. 1941). *But see Powers v. Cunard S.S. Co.*, 32 F.2d 720 (S.D.N.Y. 1925).

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[7] Under Rev. Stat. § 4283 (1878) (current version at 46 U.S.C. App. § 183), when a loss or injury occurred "without the privity, or knowledge" of a vessel owner, the owner could limit its liability to the value of its interest in the vessel and "her freight then pending."

Section 764 also made it explicit that American courts would continue to hear these suits under foreign law. While the courts' authority to do so did not depend on § 764, without § 764 the Death on the High Seas Act would have been open to the judicial interpretation that it was a congressional attempt – albeit an illegitimate one in the eyes of the Senate Committee – to impose a new American law of wrongful death on all suits brought in U.S. courts, including those against foreign defendants. Some maritime statutes of the period explicitly applied to foreigners and their vessels. *See, e.g.*, Act of Mar. 4, 1915, ch. 153, § 4, 38 Stat. 1164, 1165. Others, like the limitation of liability statute (which at that time applied to "the owner of any vessel," Rev. Stat. § 4283), were less clear on the point, but the courts interpreted them to apply to foreigners as well as Americans, *see, e.g., The Titanic*, 233 U.S. at 731. Thus, § 764 made it certain that the substantive provisions of the Death on the High Seas Act were not to displace foreign law in those cases in which foreign law already applied.

We therefore find no reason for concluding that § 764 requires the abandonment of normal choice-of-law principles, as plaintiffs suggest, allowing them to combine the most favorable elements of U.S. law, South Korean law, and perhaps also any other nation's law. Section 764 and foreign law play no role once a court determines that U.S. law governs an action.

Affirmed.

United States Court of Appeals
For The District of Columbia Circuit

No. 96-5278 **September Term, 1996**
83ms00345

In re: Korean Airlines Disaster of September 1, 1983,

BEFORE: Wald and Randolph, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

(Filed Aug. 28, 1997)

Upon consideration of appellants' petition for rehearing filed August 7, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For The District of Columbia Circuit

No. 96-5278 **September Term, 1996**
83ms00345

In re: Korean Airlines Disaster of September 1, 1983,

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

(Filed Aug. 28, 1997)

Upon consideration of appellants' Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Relevant Provisions of the Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. 49 Stat. 3018.

Article 24

1. In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights. 49 Stat. 3020.

Article 25(1)

1. The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. 49 Stat. 3020.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of Action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the territories or dependencies of the United States', the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in

an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§765. Death of plaintiff pending action

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.
